IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

NO. 53.

GANGE LUMBER COMPANY, *Appellant,*

v.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

SMITH TROY,
Attorney General of the State of Washington,

HARRY ELLSWORTH FOSTER,
Special Assistant Attorney General of the State of Washington,

Counsel for Appellee, Department of Labor and Industries.

501 Security Building, Olympia, Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

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BRIEF OF APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is *Gange Lumber Co. v. Rowley, et al.*, reported in 122 Wash. Dec. 234. However, the discussion of the merits is found in the previous opinion in the same case, 21 Wash. (2d) 420.

QUESTION PRESENTED

Is section 1, chapter 209, Laws of 1941, in violation of the due process and equal protection clauses of the Fourteenth Amendment?

The subdivision of the section of the statute involved is printed in full in the appendix as it now exists and as originally enacted and intervening amendments.

STATEMENT OF THE CASE

Appellant asserts that it has rights arising under the equal protection and due process clauses of the Fourteenth Amendment which were infringed by the enactment of subdivision (h) of section 1, chapter 209, Laws of 1941. Appellant's statement of the points to be relied upon required by Paragraph Nine of Rule Thirteen is:

> "Comes now the Appellant and adopts its Assignment of Error as its statement of the points to be relied up, * * *." (R., p. 88.)

Subdivision (h) of section 5, chapter 74 of Session Laws of 1911 (Appendix, p. 35) invested the department with continuing jurisdiction and without limitation of time for the reopening of claims and award of additional compensation should the disability become enlarged. In the recast of the section in 1927 (Appendix, p. 35) the legislature limited the time for judicial review of such departmental refusal to reopen to three years after the final closing of the claim. The amendment was reviewed upon appeal in *Mattson v. Department of Labor and Industries*, 293 U. S. 151. In the amendment now under attack (Appendix, p. 35) the right of judicial review is specifically extended to departmental action on applications to reopen in claims theretofore closed for more than five years.

Appellant "within due time" asserted that its rights under the due process and equal protection clauses of the Fourteenth Amendment were invaded by the statute in question, but the record is completely barren of any showing of any rights of the appellant. The Supreme Court of the State of Washington disposed of these several assignments of error by holding that no rights were involved and that the statute related solely to the remedy. The award of $460.50 is payable only from the accident fund of the State of Washington and not by the appellant, and its payment is in nowise dependent upon the continued existence of the appellant nor its continuance in operation, nor upon any future contributions by it to the accident fund of the State of Washington.

SUMMARY OF ARGUMENT

1. Is This Case Properly Here?

The Supreme Court of Washington decided that the appellant had no vested interest in the accident fund of the State of Washington out of which the award in question will be paid and that the statute in question merely affected the remedy and did not touch any right. If the statute thus construed does leave a Federal question it is unsubstantial upon the authority of *Chase Securities Corporation v. Donaldson*, 65 S. Ct. 1137.

2. Purpose of the Statute

The purpose of reopening provisions in workmen's compensation and industrial insurance acts is to avoid a complete adjudication of the award of compensation reserving continuing jurisdiction to allow additional compensation for an increase in the disability.

3. Construction of Statute State Question

The meaning placed upon a state statute by the highest court of the state is conclusive upon a review in the Supreme Court of the United States.

4. No Vested Rights in the Accident Fund

The accident fund of the State of Washington out of which the award in question will be paid is a state fund in which the appellant has no vested rights.

5. Remedy Not Right Involved

The 1941 amendment here drawn in controversy does not create a new right to recover additional compensation on account of the increase or aggravation of the original disability, but merely restores in part a remedy, that is, the right of judicial review in the event the Department of Labor and Industries refuses to allow such relief. The Department of Labor and Industries always possessed through the director continuing jurisdiction to reopen any claim irrespective of the length of time it had been closed should an increase of the disability result.

6. Police Power

The Workmen's Compensation Act of the State of Washington was passed in the legitimate exercise of the police power.

ARGUMENT

Is This Case Properly Here?

Previous counsel perhaps considered this case properly here when a stipulation was signed to include in the printed record excerpts from the appellant's brief in the Supreme Court of the state for the apparent purpose of showing jurisdiction, but briefs are not part of the record, *Zadig v. Baldwin*, 166 U. S. 485, and jurisdiction may not be estabIsihed by consent or acquiescence. *People ex rel. Bryant v. Zimmerman*, 278 U. S. 63. An independent Federal ground alone can confer jurisdiction, and even if a Federal question has been properly raised below, jurisdiction does not exist if the case was disposed of upon an independent state ground, or even if the decision rests in part upon a non-Federal ground adequate to support it and a Federal question determined which would otherwise be adequate to establish jurisdiction. *Flournoy v. Wiener*, 321 U. S. 253, 262.

The Supreme Court of Washington did not attempt to dodge the questions claimed by the appellate to violate its rights under the Fourteenth Amendment, but upon the contrary the court in its opinion, 122 Wash. Dec. 234 (R., p. 72), in a painstaking and careful effort set them out in full by adequate quotations from the appellant's brief. The court's opinion concludes that all questions were foreclosed by the original opinion:

> "No question of fact having been raised on this appeal, the only issues of law raised herein having been decided adversely to appellant's contention on the former appeal, it follows that the trial court correctly dismissed this action, as the trial court was bound by the law of the case as established by this court on the former appeal."

That the construction of the state statute by the highest court of the state is controlling is beyond argument. The conclusion of the Supreme Court of Washington that the appellant had no vested right in the accident fund is an independent state ground precluding consideration of the Federal questions urged by the appellant. The court below decided that the statute assailed dealt only with the remedy, which conclusion is established beyond doubt by the authorities discussed in subsequent divisions of this brief.

It may be claimed that the statute so construed and characterized by the highest court of the state leaves a residual Federal question that rights guaranteed appellant under the Fourteenth Amendment are violated by the amendment, but then the jurisdiction is left hanging by an extremely precarious thread and the reiteration of the conclusions in *Campbell v. Holt*, 115 U. S. 620, in *Chase Securities Corporation v. Donaldson*, 65 S. Ct. 1137, renders it unsubstantial.

Purpose of Statute

Most industrial insurance acts and workmen's compensation acts provide for a reopening and allowance of additional compensation and medical aid if, after the award of compensation, the disability is enlarged. It is profitable to consider the reason for such provisions. The common law measure of damages for personal injuries not only comprehends past and present pain, suffering and physical impairment but future pain, suffering and physical impairment as well. Although the courts adopted rules requiring the evidence of future pain, suffering and physical impairment to be reasonably certain, nevertheless, speculation inhered in the rule result-

ing in excessive awards in some instances and trivial or inconsequential awards in others, but the common law rule against splitting causes of action required a full, complete and final adjudication of all the rights and liabilities of the parties in a single action.

In the drafting of industrial insurance and workmen's compensation acts no such limitations were encountered. Compensation awards are for existing disabilities only. The tribunals administering such acts are commonly vested with continuing authority to award additional compensation for increase in the disability or, in the event the disability terminates or diminishes, to reduce or terminate the compensation. This permits a precise and accurate determination of the disability by actual development rather than forecasting of the future. While there are many cases in which the reasons for such provisions are adequately set forth, the Supreme Court of Oklahoma in *Choctaw Portland Cement Co., et al. v. Lamb*, 79 Okl. 109, 110, 189 Pac. 750, 751, aptly summarized the underlying philosophy as follows:

> "It is a well-known fact that the nature and probable effect of an injury, in many cases, cannot immediately be determined by the most proficient physicians or surgeons, and we are confident that the Legislature had this fact in mind when it provided in section 14, art. 4, for subsequent physical examinations, and conferred jurisdiction on the commission to modify or change its former findings or orders. The provision thus serves as a protection both to the employer and employe, and enables the commission to change its findings and orders to effectuate justice, where the amount previously awarded was either too large or too small, or where the commission had previously erred in fixing the compensation through mistake, or because of fraud practiced upon it. * * *"

In the original enactment of the Industrial Insurance Act of the State of Washington (Appendix, p. 35) no limit of time was placed upon the award of additional compensation for increased disability or change of condition, or the judicial review of such departmental orders, but in 1927 while the department's power to award additional compensation for an increase of disability or change of condition was left unchanged, a limitation of three years was imposed upon the right of judicial review of departmental action denying such award. In 1941 the legislature by the amendment in question (Appendix, p. 35) enlarged the time for judicial review to five years after the effective date of the amendment, which is December 2, 1942.

There was an adequate and well-founded reason for it. The war emergency provoked an acute shortage of labor. Many men with varying degrees of disability, who would be unemployable if an oversupply of labor was available, readily secured employment at substantial wages. Under such circumstances laboring men and women may sleep upon their rights and allow rights under the industrial insurance act to expire, or perhaps because of such employment might not be able to obtain additional compensation. When again there is an oversupply of labor such persons may very well become public charges. To guard against that situation the legislature exercised the police power and enlarged the remedy.

Construction of Statute State Question

The 4th Assignment of Error is as follows (R., p. 83):

"The Supreme Court of the State of Washington by its judgment erred in holding that the contributions or premiums exacted of an employer by the Workmen's Compensation Act of the State of

Washington and paid by the employer into the accident fund maintained by the appellee Department of Labor and Industries of said State are a license or excise tax."

That assignment is without merit because the construction placed upon a state statute by the highest court of a state is completely binding upon the Supreme Court of the United States and this tribunal takes the statute as though it read precisely as the highest court in the state had interpreted it.

State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U. S. 270;

Supreme Lodge, K. P. v. Meyer, 265 U. S. 30;

Guaranty Trust Co. v. Blodgett, 287 U. S. 509;

Hicklin v. Coney, 290 U. S. 169;

Georgia R. & E. Co. v. Decatur, 295 U. S. 165;

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Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County, 284 U. S. 8;

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494;

Dorchy v. State of Kansas, 272 U. S. 306;

Roe v. State of Kansas ex rel. Smith, 278 U. S. 191;

Ex parte Worcester County Nat. Bank. of Worcester, 279 U. S. 347;

Memphis & C. Ry. Co. v. Pace, 282 U. S. 241.

Nickey v. State of Mississippi, 292 U. S. 393;

State of Missouri ex rel. Hurwitz v. North, 271 U. S. 40;

Keith v. Johnson, 271 U. S. 1;

Gregg Dyeing Co. v. Query, 286 U. S. 472;

American Ry. Express Co. v. F. S. Royster Guano Co., 273 U. S. 274;

Thornton v. Duffy, 254 U. S. 361.

No Vested Rights in State Accident Fund

The accident fund, created by Sec. 7676, Rem. Rev. Stat. of Washington, provides.

> "* * * The fund thereby created shall be termed the 'accident fund' which shall be devoted to the purpose specified for it in this act."

and the legislature has exclusive control over it and no moneys may be paid from it without a legislatvie appropriation pursuant to Section 4 of Article VIII of the State Constitution. *State ex rel. Shuff v. Clausen*, 131 Wash. 119.

The award of $460.50 is payable only from the accident fund of the State of Washington and its payment is in nowise dependent upon the continued existence of the appellant nor the continuance of its payment of premiums, if, in fact, it is presently a contributor. No evidence was adduced in any of the proceedings below. The only claim in the record is in Paragraph Seven in the application of the Gange Lumber Company addressed to the Joint Board of the Department of Labor and Industries (R., p. 31):

> "7. That, notwithstanding the aforesaid decision of the Supreme Court of the State of Washington, the 1941 Act, as interpreted by said Supreme Court as aforesaid, and said order of the Supervisor of Industrial Insurance dated November 25, 1944 entered pursuant thereto, insofar as said Act and order provide for an award to the claimant although his right to apply for or receive such an award had once (fol. 35) become barred, and insofar as said Act and order require the amount of such award to be charged to your petitioner's cost experience under said Workmen's Compensation Act, constitute a taking of the property of your petitioner without due process of law and deny your petitioner the equal protection of the laws in violation of the Fourteenth

Amendment to the Constitution of the United States and are void."

The record is completely silent as to whether or not appellant is now engaged in any extrahazardous occupation in the State of Washington as a result of which it is obliged to contribute to the accident fund, and there is no showing that appellant has any intention of so engaging in the future, and specifically there is no allegation that it will be in operation in the month of September following the final payment of this award.

The payment when made may possibly be one factor in determining the appellant's future premium rate, but there is no showing of it in the record. For ought that appears therein, if it is a contributor it may already be over the maximum rate and not be affected by any further awards. The award can in nowise increase the rate of appellant's industrial insurance premiums until the September following the payment. In no event however is there any requirement that the appellant pay Rowley's award or even that it contribute towards the payment of it. The award is payable solely from the accident fund. The applicable provision of the statute is found in Sec. 7676, Rem. Rev. Stat., Supp., of Washington:

> "The actual premium rate which any employer shall be required to pay for the accident fund shall be forty per cent (40%) of the basic rate, plus sixty per cent (60%) of the employer's cost rate for each workman hour reported by him during each fiscal year over the five-year period next preceding the then last September first, but in no case shall the total rate exceed one hundred sixty per cent (160%) of the basic rate."

The Industrial Insurance Act of the State of Washington creates a compulsory state monopoly. All awards

are paid from the accident fund. *The employer is not even a party.* It was characterized by the Supreme Court of Washington in *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, as follows:

> "To resume, ours is not an employer's liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the industrial insurance commission. All the features of an insurance act are present. Not only are all remedies between master and servant abolished, and, in the words of the statute, all phases of them withdrawn from private controversy, but the employee is no longer to look to the master even for the scheduled and mandatory compensation. He must look only to a fund fed by various employers. When the employer, for his part, pays his share into this fund, all obligation on his part to anybody is ended. Let a claim be rejected by the commission, the latter and not the employer is to be sued. Nor is the commission so much as selected by the parties. The state administers the fund. Few foreign countries had yet adopted a scheme so comprehensive. Germany alone furnished a precedent. In subsequent legislation in this country only one or two states have adopted this principle and none have pushed it so far."

This court in *Mountain Timber Company v. Washington*, 243 U. S. 219, likewise noticed the same characteristics:

> "The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recovert damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and

for dependents of those whose injuries result in death. * * *

"From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries * * * and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion of the hazard of each class of occupation."

And in the opinion below the court said:

"The fact that an employer has a right to appear and contest a claim of an injured workman and to take an appeal from an adverse decision, does not give him any right in or to the accident fund, and we have never held that he has any so-called vested right therein. The reason he may contest a claim is that his cost experience would be affected by an unlawful use of the fund. When it is finally decided that a claimant is entitled to compensation, all further interest on the part of the employer ceases, and all procedual and administrative questions are of no concern of his, but lie only between the claimant and the department." (21 Wash. (2d) 427.)

and further:

"The lapse of time limitation does not build up any immunity in favor of the employer or bring into being any vested right that can be affected if the time limitation is changed." (21 Wash. (2d) 429.)

Ohio likewise has a compulsory state monopoly industrial insurance system which was similarly characterized by the Supreme Court of Ohio in *Copperweld Steel Co. v. Industrial Insurance Commission of Ohio*, 143 O. S. 591. That case was subsequently here upon review but the court found it unnecessary to deal with this aspect of the situation (*Copperweld Steel Co. v. Industrial Insurance Commission of Ohio*, decided April 23, 1945, No. 684, October Term, 1944, 65 S. Ct. 1006).

Fundamentally, before any rights of the appellant can be invaded by the statute in question it must have a vested interest in the fund, but it is exclusively a state fund subject to the control of the legislature for the purposes specified in the industrial insurance act. If the award in question were to be paid by the appellant an entirely different question would be encountered. Only the accident fund of the State of Washington is involved in which the appellant has no vested interest. All appellant's obligations to its employees are extinguished by the payment of its premiums.

Remedy Only Not Right Involved

The 1941 amendment here drawn in controversy does not create a new right to recover additional compensation on account of the increase or aggravation of the original disability, but merely restores in part a remedy, that is, the right of judicial review in the event the Department of Labor and Industries refuses to allow such relief. The Department of Labor and Industries always possessed through the director continuing jurisdiction to reopen any claim irrespective of the length of time it had been closed should an increase of the disability result.

Mattson v. Department of Labor and Industries, 293 U. S. 151;

Peramino Lumber Co. v. Marshall, 309 U. S. 370;

New Amsterdam Casualty Co. v. Cardillo, 71 App. D. C. 172, 108 F. (2d) 492;

Lane v. Department of Labor and Industries, 21 Wn. (2d) 420;

Smith v. Department of Labor and Industries, 8 Wn. (2d) 587;

State ex rel. Griffin v. State Industrial Accident Commission, 145 Or. 443, 445, 28 Pac. (2d) 237;

Matter of Vincent v. Allerton House Co., 177 N. E. 25, 256 N. Y. 522;

Montgomery v. Seneca Iron & Steel Co., 257 N. Y. S. 556, 236 App. Div. 19.

Under subdivision (h) of Sec. 7679, Rem. Rev. Stat. of Washington, an injured workman could always have his claim for compensation reopened and additional compensation awarded if the disability became worse, and the department always had the power to reopen a closed claim and award additional compensation under such circumstances, but the right of judicial review of such refusal was withdrawn in 1927 if the claim had been closed more than three years. The amendment in question restores the right of judicial review of departmental refusal of such relief on all closed claims for a period of five years from the effective date of the amendment.

Appellant constantly reasserts that the statute in question revives claims theretofore barred. This is unfounded. The court below reiterated that the remedy only is involved. The decisions of the Supreme Court of the State of Washington construing the statute in question hold that the right always existed but that in recasting the section in 1927 and 1929 the legislature merely withdrew the remedy.

Specifically, in *Smith v. Department of Labor and Industries*, 8 Wn. (2d) 587, it was determined that the right to have a claim reopened always existed even prior to the amendment now under attack. When a three-year limitation existed as to the remedy it was held that the director might at any time reopen a claim, notwithstanding the fact that it had been closed for more than three years. In the course of that opinion Mr. Justice Millard, speaking for a unanimous court, said:

"The Washington Legislature conferred continuing jurisdiction upon the Director of Labor and Industries so that he may at any time upon his own motion grant additional compensation to an injured workman, if he finds that there has been, in fact, an aggravation of the injury."

In addressing itself to this aspect of the question the court below in the instant case said:

"The other type of statute is one which relates only to the remedy and has nothing to do with any right or obligation, does not inhere in either, and is wholly independent of them. It is a statute of limitations in its strict sense and, although a remedy may become barrer thereunder, the right or obligation is not extinguished. It is a statute of repose."

* * * * * * * * * * *

"The employer has never had anything to say about when a claim for aggravation of injury may be made, and the fact that after sixteen years of operation of the law the legislature decided to require the injured workman claiming aggravation to make his claim within a limited time, did not change the status of the employer with reference to the accident fund. It did not thereby create a statute of nonclaim. It merely affected the remedy of the injured workman. It was enacted for the benefit of the department so that it would not have to consider stale claims, when perhaps the securing of evidence as to their merit might be difficult or impossible. The claim of the workman is not one against the employer and the limitation period was not made for the employer's benefit.

"The limitation periods fixed by the acts of 1927, 1929 and 1941 have no relation to the right to a readjustment of compensation created by the act of 1911, and do not inhere therein, but relate only to the remedy of the claimant. * * *" (21 Wn. (2d) 426, 428.)

That decision demonstrates that no right is involved by the amendment now under attack, for had the legislature not enacted the challenged amendment the director,

nevertheless, has the power to reopen this and every other case and award additional compensation no matter when closed. The statute did not revive a dead claim.

The same conclusion was reached under an almost identical statute (Appendix, p. 36) in *State ex rel. Griffin v. State Industrial Accident Commission*, 145 Or. 443, 445, 28 Pac. (2d) 237:

> "Construing the Workmen's Compensation Act in its entirety, it is apparent that the legislature in passing it, and the electorate in approving it, did not intend to deprive the commission of the right to readjust or terminate compensation to the injured workman when his condition had changed, subsequent to the commission's award or the judgment of the court."

In the decision now under review, the Supreme Court of Washington held that the statute in question did not disturb any vested right of the appellant under the United States Constitution, but dealt with the remedy only. This court reached the same conclusion concerning a prior amendment of the same section in *Mattson v. Department of Labor and Industries*, 293 U. S. 151:

> "* * * The section under attack merely limits the time for the assertion of the right, affects the remedy only, and that in a manner not unreasonable, arbitrary or oppressive. Such a limitation of time within which appellant's remedy must be pursued does not deprive him of due process."

Peramino Lumber Co. v. Marshall, 309 U. S. 370, is quite significant. In that instance five years after the compensation award became final Congress passed a private act authorizing further proceedings. The issue was summarized in the following paragraph:

> "By direct appeal the appellants challenge the decree below, contending that the private act violates the due process clause of the Fifth Amendment. The

argument of appellants is that the original award was an adjudication on which further review was barred prior to the enactment of the private act; that thereby rights and obligations were finally determined, the deprivation of which took from appellants a substantive immunity from further claims of Clark and created in Clark new substantive rights."

The court rejected those arguments and concluded:

"An award under the Longshoremen's and Harbor Workers' Compensation Act determines the liability of employer to employee. But we do not agree that the immunity obtained by the lapse of the time for review is the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim. This private act does not set aside a judgment, create a new right of action or direct the entry of an award. The hearing provided for is subject to the provisions of the general act for longshoremen's and harbor workers' compensation. It does not operate to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing injury had been known during the period of compensation, payments of the same amount due under the award authorized by this act would have been due to the employee. In such circumstances we see no violation of the due process clause."

The United States Court of Appeals for the District of Columbia in *New Amsterdam Casualty Co. v. Cardillo*, 71 App. D. C. 172, 108 F. (2d) 492, considered a very similar question arising under the Longshoremen's and Harbor Workers' Act. That court concluded:

"* * * We think, in this view, that the passage of the amendment neither creates new, nor destroys old rights. It applies only to the remedy, and from its date it permits the deputy to enlarge or diminish the former award to meet the circumstances of a particular case. We think Congress had the power to extend or to contract the period of limi-

tation as applicable to an indemnity claim either pending or subsequently brought. * * *"

The same conclusion was reached by the New York Court of Appeals in the *Matter of Vincent v. Allerton House Co.*, 177 N. E. 25, 256 N. Y. 522:

"* * * After the accident and injury had occurred, subdivision 6-a was added to the law. It reads: 'The board may, within one year from the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interest of justice.' (Laws of 1927, ch. 557, in effect July 1st, 1927.) This subdivision was effective to forbid reclassification unless made within one year of the occurrence of the accident. *(Matter of Schaefer v. Buffalo Steel Car Co., supra.)* In this instance the reclassification was not made within the time fixed. We think that this subdivision was intended to have application, in respect to a reclassification of all injuries, whether previously or subsequently occurring; that it affected the remedy and not the right; that it was applicable to the case of this claimant. Therefore, the Board had no power to make the award in question."

The Appellate Division of the Supreme Court of New York elaborated upon that view in *Montgomery v. Seneca Iron & Steel Co.*, 257 N. Y. S. 556, 236 App. Div. 19:

"It is conceded that subdivision 6-a is retroactive (*Matter of Vincent v. Allerton House Co., supra*), and that the 1931 amendment is applicable to accrued as well as to future claims. It is argued, however, that it does not revive claims which were already extinguished, citing *Hopkins v. Lincoln Trust Co.*, 233 N. Y. 213, 135 N. E. 267; *County of Erie v. Lowenstein*, 235 N. Y. 458, 139 N. E. 573; *Orton v. Olds Motor Works*, 229 App. Div. 46, 240 N. Y. S. 570. We are not here dealing with the revival of a right or claim which has been extinguished, but simply with a power of the board to afford a specific remedy within three years of the date of accident because one

year was found by the Legislature to be inadequate for the just determination of a disability classification. The original subdivision 6-a was held to affect 'the remedy and not the right,' and 'was intended to have application in respect to a reclassification of all injuries, whether previously or subsequently occurring.' *Matter of Vincent v. Allerton House Co., supra.* It is logical to assume that the 1931 amendment was intended to have like applicability to all injuries. The Legislature had the power to so apply it. 'No right is destroyed when the law restores a remedy which had been lost.' *Campbell v. Holt,* 115 U. S. 620, 628, 6 S. Ct. 209, 213, 29 L. Ed. 483. See, also, *Robinson v. Robins Dry Dock & Repair Co.,* 238 N. Y. 271, 144 N. E. 579, 36 A. L. R. 1310. * * *"

The New Jersey Court of Errors and Appeals in *Ferguson Co. v. Seaman,* 119 N. J. L. 575, 197 Atl. 245, was called upon to consider the statute of that state providing for a review of a formal award for increased incapacity enacted after award of compensation. The claim was made that the amendment violated the due process and equal protection clauses of the Fourteenth Amendment which view was rejected. The court said:

"And so the amendment in question affects the remedy merely. Such a proceeding necessarily relates back to the original injury; it is designed to adjust the formal award to accord with an increase or diminution of the incapacity flowing from that injury, and thus to make effective the statutory policy of compensation for the full disability—neither more nor less. This liability for compensation for the entire consequent incapacity, including any subsequent increase thereof, was basic in the statute as it then existed; and the amendment, in substance and effect, constituted but an extension—in harmony with the provisions relating to informal awards—of the time for bringing action to recover the compensation for such disability. It merely extended the time for the commencement of action to recover for the increased disability beyond the entry of the formal award.

"* * * But the statutory liability of the employer nevertheless comprehends compensation for the entire disability, within the fixed maximum. And the amendment, in furtherance of that policy, permits of a modification in consonance with the subsequent increase or diminishment of incapacity. There is no enlargement of the primary statutory liability; no new or additional burden is imposed. That was known to be the employer's obligation when he elected to accept the provisions of section II of the statute. The amendment was simply a regulation of the procedure to subserve the statutory policy—to insure the payment of the compensation prescribed for the actual period of disability, but no more. The employer has no constitutional or vested right to the maintenance of a procedural system that in some cases works a denial of the prescribed compensation, especially where there is made available to him a correlative remedy against the payment of compensation when disability has ceased. To hold that the employer cannot be called upon for compensation for increased disability after a formal award is to bestow upon the employe the reciprocal right to a continuance of compensation payments after such an award, even though disability has ended. And this would run counter to the spirit of the enactment."

In *Chase Securities Corporation v. Donaldson*, decided May 21, 1945, No. 110 October Term, 1944, 65 S. Ct. 1137, this court was called upon under the Fourteenth Amendment to determine the validity of a Minnesota statute lifting the bar of the statute of limitations in an action under the Blue Sky Law. Like the Supreme Court of Washington did in this instance, the Supreme Court of Minnesota relied upon *Campbell v. Holt*, 115 U. S. 620, and observed that it was a controlling exposition of the limitations imposed by the Fourteenth Amendment upon state laws. On appeal in the Supreme Court of the United States the appellant strenuously argued that *Campbell v.*

Holt, supra, should be overruled but the court declined. The matter is now settled. The full discussion of the constitutional question in the opinion is:

"The substantial federal questions which survive the state court decision are whether this case is governed by *Campbell v. Holt* and if so, whether that case should be reconsidered and overruled.

"In *Campbell v. Holt, supra,* this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here and fatal to the contentions of appellant.

"Appellant asks that in case we find *Campbell v. Holt* controlling it be reconsidered and overruled We are reminded that some state courts have not followed it in construing provisions of their constitutions similar to the due process clause. Many have, as they are privileged to do, so interpreted their own easily amendable constitutions to give restrictive clauses a more rigid interpretation than we properly could impose upon them from without by construction of the federal instrument which is amendable only with great difficulty and with the cooperation of many States.

"We are also cited to some criticism of *Campbell v. Holt* in legal literature. But neither in volume nor in weight are they more impressive than has been directed at many decisions that deal with controversial and recurrent issues.

"Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain

as a 'right' a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.

"Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

"This Court, in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. The contrast between the acceptable result of the reasoning of *Campbell v. Holt* and its rather unsatisfactory rationalization was well pointed out by Mr. Justice Holmes when as Chief Justice of Massachusetts he wrote:

" 'Nevertheless in this case, as in others, the pre-

vailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield v. United States*, 167 U. S. 518, 523, 524. But, however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.' *Danforth v. Groton Water Co.*, 178 Mass. 472, 476. This statement was approved and followed by the New York Court of Appeals in *Robinson v. Robins Dry Dock and Repair Co.*, 238 N. Y. 271.

"The essential holding in *Campbell v. Holt*, so far as it applies to this case, is sound and should not be overruled. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or op-

pressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federal constitutional right. The judgment is affirmed."

Police Power

In the opinion below (21 Wn. (2d) 420) the Supreme Court of Washington specifically declared that the amendment in question was enacted under the inherent police power of the state.

It is established that the Fourteenth Amendment does not prohibit a legitimate exercise of the police power.

Powell v. Pennsylvania, 127 U. S. 678;

Lacoste v. Department of Conservation, 263 U. S. 545;

Mountain Timber Co. v. Washington, 243 U. S. 219;

New York Central R. R. Co. v. White 243 U. S. 188;

Terrace v. Thompson, 263 U. S. 197;

Arizona Employers' Liability Cases, 250 U. S. 400.

A much stronger case—a case in which one might justifiably say that rights were involved—has arisen in

the State of New York. The legislature recognized that during the war emergency the cost of living materially increased and increased the compensation schedule. It was urged that such increase so far as pending cases were concerned was void in consequence of the constitutional provisions of the Federal and State Constitutions. The views expressed in that opinion are particularly pertinent and in discussing the constitutional questions the court said (*Schmidt v. Wolf Contracting Co.*, 55 N. Y. S. (2d) 162):

> "Even if it be assumed that liability under the Workmen's Compensation Law is contractual, the amendment is not thereby violative of the provisions of the Constitution of the United States. The police power of the state may be exercised to affect the due process of law clause as well as the impairment of contract clause of the Federal Constitution.
>
> "The subject matter of workmen's compensation reposes within the control of the Legislature."
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> * * * * * * * * * *
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> "The constitutional prohibition that no state shall pass any law which shall deprive a person of life, liberty or property without due process is not absolute. *Matter of People v. Title & Mortgage Guarantee Co. of Buffalo*, 264 N. Y. 69, 190 N. E. 153, 96 A. L. R. 297; *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. R. 1481."
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> * * * * * * * * * *
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> "The amendment in question was enacted in the exercise of the police power of the state and hence violates neither its constitution nor the Federal Constitution. The principle of workmen's compensation is the promotion of public good. *Matter of Petrie, supra; Matter of Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158; *New York Central R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.
>
> "In the case of *Guttag v. Shatzkin*, 230 N. Y. 647, at page 650, 130 N. E. 929, at page 930, the court said:

"'While the states are subject to the contract clause of section 10, article 1 and section 1, article 14, of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Conceding the health, safety, and morals of its citizens to be involved, and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way. *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1428. These sections of our federal Constitution and the police power of the states harmonize and never conflict. The only question here is one of fact, not one of law: Do the facts call into existence the power reserved to the states to legislate for the safety and health of the people? Within its sphere the police power of the states is not unlike the war power of the nation. Both are rules of necessity, impliedly or expressly existing in every form of government; and the one to preserve the health and morals of a community; the other to preserve sovereignty.'"

CONCLUSION

The statutory amendment under attack by the appellant in this case does not revive any dead claims. The department always had and now has full statutory authority to reopen any case whenever closed and award whatever additional compensation it believes warranted. The statute merely enlarged or restored the right of judicial review of departmental denial of such an application for additional compensation. The appellant has no vested rights in the accident fund and the statute deals only with the remedy and, therefore, disturbs no rights.

Olympia, Washington, September 24, 1945.

Respectfully submitted

SMITH TROY,
Attorney General of the State of Washington,

HARRY ELLSWORTH FOSTER,
Special Assistant Attorney General of the State of Washington,

Counsel for Appellee, Department of Labor and Industries.

APPENDIX

Subdivision (h), section 5, chapter 74, Session Laws, 1911:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payments."

Subdivision (h), section 4, chapter 310, Session Laws, 1927:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided*, Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment."

Subdivision (h), section 1, chapter 209, Laws of Washington, 1941:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within five

years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have five (5) years from the taking effect of this act within which to apply for such readjustment."

Subdivision (c), section 5, chapter 133, General Laws of Oregon, 1925:

"(c) *Rearrangement of Compensation.* If subsequent to the last award or arrangement of compensation by the commission there has been an aggravation of the disability resulting from an accidental injury, the injured workman shall file with the commission an application for increased compensation, which application shall set forth sufficient facts to show an aggravation in such disability and the degree thereof. Any application for increased compensation for aggravation must be filed within one year from the date of the first award of compensation to the claimant: No increase or rearrangement in compensation shall be operative for any period prior to the application therefor. However, the power and jurisdiction of the commission shall be continuing, and it may, upon its own motion only, from time to time make such modification or change with respect to former findings, orders or awards as in its opinion may be justified, but no appeal from or review of such proceedings shall be had."